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IN THE

Supreme Court of the United States

October Term, 1972

No. 72-1378

CHRISTIAN ECHOES NATIONAL MINISTRY, INC.,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

BRIEF *AMICI CURIAE* OF UNITED SYNAGOGUE OF AMERICA, UNION OF AMERICAN HEBREW CONGREGATIONS, CENTRAL CONFERENCE OF AMERICAN RABBIS AND RABBINICAL ASSEMBLY, ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE TENTH CIRCUIT

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Interest of the *Amici*

The United Synagogue of America is the national organization of Conservative synagogues in the United States. The Union of American Hebrew Congregations is the national organization of Reform synagogues in the United States. The Central Conference of American Rabbis is

the national organization of Reform rabbis in the United States. The Rabbinical Assembly is the national organization of Conservative rabbis in the United States.

All the *amici* and their members share a commitment to the creative survival of Judaism and to American democratic values. They deem valid today the counsel given to Babylonian Jewry: "Seek ye the welfare of the city to which I have sent ye and pray for it to the Lord, for in its welfare will you find our welfare" (Jer. 29:7). They believe today that the welfare of the American Jewish community is inextricably bound to the welfare of the American democratic society.

For this reason all the *amici* have from time to time expressed themselves publicly on issues relevant to the welfare of the American people. Their organizational resolutions and statements have often addressed themselves to what they deem the four pillars of American democracy—freedom, justice, equality and peace.

In doing this, they have followed ancient Jewish tradition. From its beginnings Judaism has recognized an obligation to speak against the evils and failings of the society in which Jews live. Throughout the Hebrew Scriptures is the consistent motif that the obligations of man are not limited to prayer, worship and other invocations of the Almighty, but encompass no less the duties owed by man to his fellowman. Judaism has never accepted and does not now accept any dichotomy or conflict between man's relationship to God and his relationship to other men. Nor has Judaism accepted a lesser obligation to speak out for freedom, justice, equality and peace than to pray for these to God.

Throughout history, the prophets and leaders of Judaism have confronted the authorities and have challenged denials of freedom, justice, equality and peace. The first Patriarch, the founder of Hebrew monotheism, asked of God Himself, "Shall not the Judge of all the earth do justice?" (Gen. 28:25). Moses demanded of the Pharoah of Egypt that he grant freedom to the Hebrew slaves, and later commanded the Hebrews themselves to "proclaim liberty throughout the land and to all the inhabitants thereof" (Lev. 25:10). Throughout the Torah, Moses, the first and greatest of the prophets, demanded of kings, judges, and peoples that they pursue justice, treat as equals to themselves the alien and the stranger, and refrain from oppressing the poor, the workingman and the disadvantaged.

The prophets who came after Moses followed in his tradition. Nathan dared to confront David, and Elijah, Ahab, to condemn them for their tyrannical conduct (2 Sam. 12:7-12; 1 Kings 21:17-22).

Isaiah preached against the monopolists of Judah, "Woe unto them that join house to house and lay field to field till there be no place for others" (Isaiah 5:8). The established priesthood of Israel charged the prophet Amos with conspiracy because of his condemnation of tyranny and injustice in the Northern Kingdom (Amos 7:10). Jeremiah suffered imprisonment and risked his life for his public opposition to the war policies of the King of Judah (Jer. 37:11-38:28).

These incidents can be multiplied many times. They show that public expression of opposition to injustice and

inequity, even when committed by the established authority, is an inherent religious obligation of Judaism.

Aside from the fact that the petitioner's tradition is Christianity and the *amici's* Judaism, the petitioner's positions on contemporary controversial issues, the expressions of which led to the revocation of its tax exemption, are radically different from the *amici's*. Indeed, on most specific issues the *amici's* position is probably diametrically opposed to that of petitioner. Nevertheless, the *amici* recognize that a restraint upon the petitioner's freedom to express its views on social issues poses a grave threat to rabbinic, synagogue and other Jewish religious groups adhering to the prophetic mandates of their faith. Unless the Constitution protects the freedom of expression of those with whom the *amici* disagree in as full a measure as they disagree with the views of the petitioner, it does not protect their own freedom.

But it is not for that reason alone that the *amici* have sought and obtained the consent of both parties to submit this brief in support of the petitioner's writ of certiorari. They are convinced that the security of this nation rests in the greatest freedom of its people to be exposed to all conflicting views on public issues, and that, as will be indicated hereinafter, the decision of the Court of Appeals, if undisturbed, cannot but have the effect of significantly limiting that freedom.

Question Presented

Fundamentally, the question presented in this case is whether under our Constitution the revenue-raising agency of our government can act as *de facto* censor of religious expression on controversial public issues through the threat of revocation of tax exemption. More specifically, the *amici* accept the statement of questions presented as set forth in the petition for certiorari.

Constitutional and Statutory Issues Involved

The First Amendment to the United States Constitution provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Section 501(c)(3) of the Internal Revenue Code of 1954, in listing organizations exempt from taxation, exempts:

> (3) Corporations, and any community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual, no substantial part of the activities of which is carrying on propaganda, or otherwise attempting to influence legislation, and which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of any candidate for public office.

Statement of the Case

The petitioner, a concededly *bona fide* nonprofit religious organization, was accorded tax exempt status by the Internal Revenue Service in 1953. Its articles of incorporation, its bylaws, and the nature of its activities, fully revealed to the Internal Revenue Service, showed that opposition to communism, liberalism and modernism was a major part of its religious character and objectives. For a decade the petitioner conducted its activities with full knowledge of the IRS, which in 1958 conducted a periodic examination into the petitioner's activities and an audit of its books and records and informed the petitioner that its tax exempt status was continued without change. Nevertheless, in 1962, under a new political administration, the national office of the IRS reached a decision that the tax exemption benefits enjoyed by petitioner should be revoked. It accordingly set into motion proceedings which ultimately led to the revocation, notwithstanding the undisputed fact that there had been no change in the nature of petitioner's activities as they were when it received its original tax exempt status in 1953. In reaching this decision the national office of the IRS overruled the findings and conclusions of the local IRS, made on three separate occasions after three separate investigations and audits, that there was no basis in law or fact to change the exempt status of petitioner.

Petitioner made payments under the Federal Contributions Act and brought suit for their recovery. The United States District Court for the Northern District of Okla-

homa decided in petitioner's favor, but the Court of Appeals for the Tenth Circuit reversed its judgment and held that petitioner had forfeited its tax exemption for violation of Section 503(c)(3) of the Internal Revenue Code.

Reasons for Granting the Writ

A. Religion as Contributor to the Marketplace of Ideas

It is a truism that American constitutional democracy rests on the premise that the best test of truth is acceptability in the marketplace of ideas (*Abrams* v. *United States*, 250 U.S. 616, 630 (1919), dissenting opinion of Mr. Justice Holmes). It is however important to appreciate the role that religion has played as a contributor to this marketplace. It is significant that one of the first major expressions of the danger of governmental intrusion in the marketplace should be contained in a statute for the protection of religious liberty, the Virginia Statute of 1786 which was the progenitor not only of the Religion Clauses of the First Amendment but of the entire Amendment. In the words of the statute (12 Hen. Va. St. 84):

> * * * To suffer the civil magistrate to intrude his powers into the field of opinion, and to restrain the profession or propagation of principles on supposition of their ill tendency is a dangerous fallacy, which at once destroys all religious liberty, because he being of course judge of that tendency will make his opinions the rule of judgment, and approve or condemn the sentiments of others only as they shall square with or differ from his own; it is time enough for the rightful purposes of civil government for its officers to interfere when the principles break out into overt acts against peace and good order; truth is great and will prevail if left to herself; she is the proper and suf-

> ficient antagonist to error and has nothing to fear from the conflict unless by human interposition disarmed of her natural weapons, free argument and debate.

In speaking of "the field of opinion" and "the profession of propagation of principles" the statute is not limited to narrow theological opinion and doctrine but encompasses expression relevant to the concerns of this world and of man's relationship to man. It was in a case involving the then highly controversial issue of slavery that this Court said (*Watson* v. *Jones*, 80 U.S. 679, 728 (1871)):

> In this country the full and free right to entertain any religious beliefs, to practice any religious principle, and to teach any religious doctrine which does not violate the laws of morality and property, and which does not infringe personal rights, is conceded to all. The law knows no heresy, and is committed to the support of no dogma, the establishment of no sect. * * *

It was in another case involving a controversial contemporary issue, nationalism and compulsory flag salute, that the Court said (*West Virginia State Board of Education* v. *Barnette*, 319 U.S. 624, 642 (1943)):

> If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion, or force citizens to confess by word or act their faith therein * * *.

In the statement of our interest (*supra*, pp. 2-4) we have noted the Jewish tradition of expressing moral judgments on the conduct of government and other established authorities and institutions. Judaism is, however, not alone among the religious faiths in recognizing this as part of its

sacred mission. From the very beginnings of our nation religious groups and leaders have intervened actively in what the Court of Appeals has characterized as the political arena. Who does not know of the great role that the Christian churches and their spiritual leaders played in the abolition of slavery? It was the Southern Christian Leadership Conference under the inspiration and guidance of the Rev. Martin Luther King that contributed so greatly to the enactment of the historic Civil Rights Act of 1964. The names of the Rev. John Haynes Holmes and Rabbi Stephen S. Wise are well known in the history of civic honesty and integrity in the United States.

The so-called political arenas in which religion has intervened throughout American history are manifold. Prohibition, birth control, abortion, capital punishment, war and peace, child labor, civil rights and race relations, civil liberties, communism, national security,—these are but a few of the instances of religion's contribution to the free marketplace of ideas. Whatever position one may take on any of these issues, it is undeniable that American democracy would be the poorer if religion had been forbidden or deterred from expressing itself freely on them. The decision of the Court of Appeals, if left standing, cannot but have the effect of substantially deterring religious organizations from making their contributions to the free marketplace of ideas.

B. The Tax Collector as Censor

In *Cantwell* v. *Connecticut*, 310 U.S. 296, 305 (1940), this Court said:

> It will be noted, however, that the Act requires an application to the secretary of the public welfare coun-

> cil of the State; that he is empowered to determine whether the cause is a religious one, and that the issue of a certificate depends upon his affirmative action. If he finds that the cause is not that of religion, to solicit for it becomes a crime. He is not to issue a certificate as a matter of course. His decision to issue or refuse it involves appraisal of facts, the exercise of judgment, and the formation of an opinion. He is authorized to withhold his approval if he determines that the cause is not a religious one. Such a censorship of religion as the means of determining its right to survive is a denial of liberty protected by the First Amendment * * *.

This we submit is the situation in the present case. For ten years the Internal Revenue Service not merely acquiesced but affirmatively sanctioned the activities which in 1962 it decided violated Section 501(c)(3). The statute itself contains no definition or criteria to determine what constitutes "carrying on propaganda or otherwise attempting to influence legislation," nor for ascertaining what is a "substantial part of * * * activities." The Internal Revenue Service has not seen fit to issue regulations defining either of these terms, nor did the Court of Appeals in its opinion undertake to do so. The result is that, as in *Cantwell*, the administrative agency has unbridled discretion in determining the "right to survive" of religious organizations which deem it part of their sacred mission to pass moral judgment on the conduct of authorities and establishments.

It is not a sufficient answer that the exercise of discretion by the IRS is subject to judicial review. Such a defense was asserted in *Cantwell* and held there to be inade-

quate, the Court stating that "the availability of a judicial remedy for abuses in the system of licensing still leaves that system one of previous restraint which, in the field of free speech and press, we have held inadmissible" (310 U.S. at 306).

The Court of Appeals recognized that no governmental official could forbid the petitioner or any other religious organization to engage in the activities which are in issue in this case, nor deprive it of any rights by reason of its participation in such activities. The Court justified its decision on the ground that "tax exemption is a privilege, a matter of grace rather than right." It is difficult to see how it could reach such a conclusion in a Free Exercise case in view of the unambiguous holdings in *Torcaso* v. *Watkins*, 367 U.S. 388 (1961) and *Sherbert* v. *Verner*, 374 U.S. 398 (1963) where this Court expressly rejected the contention that government may condition a grant of a privilege (notary public license and unemployment benefits, respectively) upon the relinquishment of a right protected by the Free Exercise Clause. It is doubly difficult in a case such as the present, where Free Exercise is bracketed with Free Speech, in view of this Court's decisions in *Speiser* v. *Randall*, 357 U.S. 513 (1958) and *First Unitarian Church* v. *County of Los Angeles*, 357 U.S. 545 (1958). In the former case the Court said (at 518):

> It cannot be gainsaid that a discriminatory denial of a tax exemption for engaging in speech is a limitation on free speech. * * * It is settled that speech can be effectively limited by the exercise of the taxing power. * * * To deny an exemption to claimants who engage in certain forms of speech is in effect to penalize them for such speech. Its deterrent effect is the same

as if the State were to fine them for this speech. The appellees are plainly mistaken in their argument that, because a tax exemption is a "privilege" or "bounty," its denial may not infringe speech.

The fallacy of the Court of Appeals' rationale lies in its implicit assumption that the exchange of silence for exemption is a private bargain concerning nobody but the tax collector and the church. Completely ignored is the interest of the American people in what the church may have to say on issues of great public importance.

Therein lies the grave danger in the Court of Appeals' decision. As a matter of economic reality in contemporary America, tax exemption and with it the deductibility from taxable income of gifts to religious institutions means survival or death to many churches and synagogues. The inevitable results of the Court of Appeals' decision, if allowed to stand, will be a reign of self-censorship by religious groups. It will take a particularly courageous congregation and pastor to risk suffering the fate of the petitioner herein by expressing what they deem the conscience of the community where controversial public issues are involved. Spiritual leaders, either by command of their congregations or by their own dictates of caution, are likely in a great many cases to restrict their sermons and other public expressions to bland pieties and platitudinous generalities.

In *Wisconsin* v. *Yoder*, 406 U.S. 205 (1972), this Court upheld the constitutional right of the Old Amish Order to separate itself from the general community and religiously abstain from participation in public affairs or express itself on political issues. But it would be a tragedy if this

pattern of behavior on the part of a small, almost unique religious sect were to become the categorical imperative for all religious groups. In *Marsh* v. *Alabama*, 326 U.S. 501 (1946), the Court, in according constitutional protection to the right of religious groups to distribute their literature in privately owned company towns, recognized the importance to our democracy of such expressions on controversial issues. The Court said (at 508):

> * * * To act as good citizens they [the residents of the town] must be informed. In order to enable them to be properly informed their information must be uncensored.

We submit that this is no less true when the censorship is self-imposed by reason of fear of the IRS than it is when exercised by an official expressly clothed with governmental censorship powers.

Among the issues upon which the petitioner expressed itself, and was thus held to forfeit its right of exemption, were prayer in the public schools, the McCarran-Walter Immigration Law, freedom of speech in the United States, the responsibility of the press, the continuance of the House Committee on Un-American Activities, disarmaments, Federal aid to education, socialized medicine, public housing, the Federal income tax and the United Nations. These and others were listed by the Court of Appeals in its decision as constituting the basis for the ruling that petitioner had devoted a "substantial part" of its activities in "carrying on propaganda or otherwise attempting to influence legislation." As we have noted (*supra*, p. 4) the *amici's* position on practically every one of these issues is diametrically opposed to that of the petitioner. Yet we would consider

it a grave loss to the American people and a direct repudiation of the principle that the best test of truth is its acceptability in the marketplace of ideas if religious groups such as the petitioner were silenced by fear from expressing their views on these issues. We do not believe that either the framers of the Constitution or the Congress, in enacting the Internal Revenue Code, intended or would sanction such a consequence.

C. The Establishment Clause and Government Entanglement

In addition to the serious constitutional questions raised by this case under the Free Exercise and Free Speech Clauses, consideration must be given to the Establishment Clause as well.

In *Watson* v. *Jones, supra*, the Court announced as national policy that the Federal judiciary should not involve itself in the internal affairs of religious organizations. In *Kedroff* v. *St. Nicholas Cathedral*, 344 U.S. 94 (1952), this judicial policy was elevated to constitutional mandate binding upon the legislative branches of government. In *Kreshik* v. *St. Nicholas Cathedral*, 363 U.S. 190 (1960) and in *Presbyterian Church in the United States* v. *Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 393 U.S. 440 (1969), the constitutional mandate was held equally applicable to the judicial branch of government. We submit it is no less applicable to the executive branch and that it has been violated in this case by the Internal Revenue Service of that branch.

This Court in *Walz* v. *Tax Commission*, 397 U.S. 664 (1970), held that consistency with the principle applied in

the above cited cases required a determination that tax exemption to churches and synagogues did not violate the Establishment Clause of the First Amendment. Taxing of religious institutions, it held, would entail considerably more governmental entanglement in religious affairs than would exemption. The Court said (at 674):

> Determining that the legislative purpose of tax exemption is not aimed at establishing, sponsoring, or supporting religion does not end the inquiry, however. We must also be sure that the end result—the effect—is not an excessive government entanglement with religion. The test is inescapably one of degree. Either course, taxation of churches or exemption, occasions some degree of involvement with religion. Elimination of exemption would tend to expand the involvement of government by giving rise to tax valuation of church property, tax liens, tax foreclosures, and the direct confrontation and conflicts that follow in the train of these legal processes.

The Court refused to relate exemption to the social welfare services or "good works" that some churches perform (*ibid.*):

> * * * The extent of social services [the Court said] may vary, depending on whether the church serves an urban or rural, a rich or poor constituency. To give emphasis to so variable an aspect of the work of religious bodies would introduce an element of governmental evaluation and standards as to the worth of particular social welfare programs, thus producing a kind of continuing day-to-day relationship which the policy of neutrality seeks to minimize. Hence, the use of a social welfare yardstick as a significant element to qualify for tax exemption could conceivably give rise to confrontations that could escalate to constitutional dimensions.

What constitutes a substantial part of the activities of a church or synagogue is no less a variable whose evaluation leads to confrontations rising to constitutional dimensions. Yet that is the inevitable result of the Court of Appeals' decision.

In *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971), the Court held violative of the Establishment Clause statutes subsidizing the secular teaching in parochial schools. The basis for the decision was that the statutes compelled governmental entanglement in religious affairs and continuing surveillance of religious activities. The Court called particular attention to the fact that under these laws the states must inspect school records to determine what part of the expenditure is attributable to secular education as opposed to religious activities. The Court emphasized that the government's power to audit the financial records creates an intimate and continuing relationship between church and state which is forbidden by the Establishment Clause.

What the Court said in *Lemon* may not be done, the Court of Appeals in the present case said must be done. The record in the present case shows repeated audits of the petitioner's records, surveillance of its activities, monitoring of its radio broadcasts, and scrutiny of its literature, all to separate permissible religious expression from "propaganda" or attempts to "influence legislation," and to ascertain whether (or, more accurately, to establish that) the latter constituted a "substantial part" of the petitioner's activities. The only way a church or synagogue can avoid this, if the Court of Appeals is correct, is to forego its tax exempt status. Yet to do so would subject it to the entanglement which the Court in *Walz* held it is the purpose of

exemption to avoid. We can, in short, see no way in which the decision of the Court of Appeals can be reconciled with this Court's decisions in *Walz* and *Lemon*.

Conclusion

The present case gives rise to grave constitutional questions of national importance. Only this Court can furnish a definitive answer to them. The Court has not heretofore addressed itself to the specific questions raised in this case. The time is ripe for it to do so, and therefore the petition for certiorari should be granted.

Respectfully submitted,

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